

OBSERVATIONS

ON A LATE PUBLICATION,

INTITULED,

THOUGHTS *on* EXECUTIVE JUSTICE.

CONSTITUTION

OF THE UNITED STATES

OF AMERICA

AS REVISED AND AMENDED

1787

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THOUGHTS on EXECUTIVE JUSTICE:

R

To which is added,

A L E T T E R

containing remarks on the same work.

NUNQUAM ALIUD NATURA, ALIUD
SAPIENTIA DICIT.

L O N D O N :

SOLD BY T. CADELL, IN THE STRAND;
AND R. FAULDER, IN NEW BOND STREET.

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OBSEKVATIONS

ON A LATE PUBLICATION

INTENDED

FOR THE USE OF THE JURY:

TO WHICH IS ADDED

A LETTER

CONTAINING REMARKS ON THE ABOVE WORK.

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M. C. C. C.

OBSERVATIONS

ON A LATE

PUBLICATION, &c.

CRIMINAL jurisprudence has within the last twenty years become a very popular study throughout Europe, and the cultivation of it has been generally attended with very sensible and very beneficial effects. In proportion as men have reflected and reasoned upon this important subject,

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the absurd and barbarous notions of justice, which prevailed for ages, have been exploded, and humane and rational principles have been adopted in their stead. That criminal prosecutions ought always to be carried on for the sake of the public, and never to gratify the passions of individuals; that the primary object of the legislature should be to prevent crimes, and not to chastise criminals; that that object cannot possibly be attained by the mere terror of punishment; and that unless a just proportion be observed between the various degrees of crimes, in the penalties appointed for them, the law must serve to excite rather

ther than to repress guilt; are truths so generally received, that they are come to be considered almost as axioms of criminal law. But considerable as has been the progress of these principles in other parts of Europe, they have not yet produced in this country any melioration of the system of our penal laws. The most glaring defects in those laws have not escaped observation, but few have attempted to remove them, and none have been successful in their attempts; and the only beneficial effect which has yet been produced in England, is a desire in the crown, and in its ministers, the judges, to remedy some of those

defects by their mode of executing the laws, and particularly by a mitigation of that indiscriminating severity, which, while it inflicts the same punishment on a pick-pocket as on a parricide, confounds all ideas of justice, and renders the laws objects, not of veneration and love, but of horror and aversion. A more permanent and a more certain correction of those defects would be so great a national benefit, as one would have thought every good and reflecting citizen must ardently have wished for. At least one would have supposed that humanity, as well as patriotism, must have forbidden any endeavours to cloud the prospect

prospect of such a reformation, and much more any efforts to lay restraint upon the sovereign, in executing, according to his oath, justice in mercy, and to enforce that *summum jus*, which, where the laws are such as constitute the criminal code of England, must ever prove *summa injuria*.

This ungrateful task, however, has been lately undertaken, and an attempt has been made to restore the law to all its sanguinary rigor, by the author of *Thoughts on executive justice, with respect to our criminal laws*; a work proceeding on principles, which are now so little prevalent, and breathing a spirit so contrary to the genius of the

present times, that I should have classed it amongst those performances, with which every literary age has been infested, and which are calculated to render the authors of them celebrated only for the singularity of their opinions, and should have therefore left it to sink into that oblivion, to which such compositions seldom fail to be soon consigned, had I not found that the warmth and the earnestness of the writer's style had gained him converts, and that some of the learned judges, to whom his work is addressed, had seemed inclined to try the terrible experiment which he recommends. Errors which produce such effects

are not to be despised as harmless ; and it is the duty of every man, who has the use of reason, and who sees their fallacy, to expose and to refute them.

What the author's motives in writing were, God and himself only know : I would fain persuade myself, that they were not such as I have already alluded to ; that he has a just claim to the title which he assumes, of " a sincere well-wisher to the public ;" and that he entertains no particle of doubt about the truth and justice of the opinions, which he has ventured to publish : and yet something more even than this seems necessary, before a man hazards

the promulgation of such rigid doctrines to the world; and that he should, not only know himself to be sincere, but believe himself to be infallible: for who, that thinks he is liable to error, can venture to propose a scheme, which, if it be erroneous, will have wantonly deprived the state of many subjects, and turned loose upon the unpitied world a miserable troop of widows and of orphans? An experiment, which is made at such a cost, ought hardly to be tried while there remains a possibility that it may fail of success. There are some opinions, which men fondly persuade themselves are truths, and truths important

important to mankind, which are, however, of such a nature that no man should dare to propound them, who is not ready to prove his sincerity by offering himself a martyr in their cause. If a legislator propose laws, like those of Draco, written in the blood of his fellow-citizens, he must seal them with his own, like Lycurgus, if he would escape the reproach of cruelty.

That the author of the *Thoughts on executive justice* had an inflexible confidence in the truth of his doctrines, might have been charitably supposed, if he had supported them only by cool and dispassionate arguments. But what are

we not compelled to think, when we see him availing himself of all the most specious colourings of rhetoric, and employing the strongest hyperboles (1), and the most exaggerated descriptions (2); at one time artfully and eloquently summoning to his aid the fears of his timid readers, and at another kindling the rage and indignation of what he calls the "poor, oppressed, and innocent

(1) "No man can stir out a mile from his house without an apprehension of being robbed, and perhaps murdered." *Thoughts*, &c. p. 73, 1st edit. p. 77. 2d edit. See too p. 4.

(2) *Ibid.* p. 5. *Appendix*, p. 62. 63, 1st edit. p. 241. 242. 2d edit.

"public :

“ public (3):” when we find him adopting that ferocious language, with which, in more barbarous times, attorney generals have sought to daunt the miserable state-prisoners, thro’ whose blood they were to wade to their disgraceful honors : when we hear him exclaiming, that “ the lurking footpad lies, like a dangerous adder, in our roads and streets, and the horrid burglar, like an evil spirit, haunts our dwelling-houses, making night hideous (4);” and when we find him attempting, as it were,

(3) *Appendix*, p. 3. 59, 1st edit. p. 181, 238, 2d edit.

(4) *Thoughts, &c.* p. 14.

to intimidate every man from questioning his doctrines, and throwing out the anticipating reproach, that none “ can reasonably find fault with the laws, “ but the villain, who is the object of them (5) ?”

But, without examining into this writer’s motives, or farther commenting upon the manner, in which he has executed his design, I shall venture, even at the risk of encountering the black imputation, which he seems to think should light upon the man, who presumes to call in question the perfection of our laws, to dispute

(5) *Thoughts, &c.* p. 7.

both the positions which he has sought to establish.

He first asserts, that the penal laws of this country are excellent (6), and that they have no severity but of the most wholesome kind (7); and this serves as the foundation of that proposition, which is the capital object of his work; namely, that those laws ought to be strictly executed, so that the certainty of punishment may operate to the prevention of crimes. If the former of these positions were true, no man of common understanding could dispute the latter; for, if laws be perfect, they ought

(6) *Thoughts, &c.* p. 2. 5. 16. 17.

(7) *Ibid.* p. 8.

undoubtedly

undoubtedly to be religiously observed ; but, if our laws, instead of being excellent, should appear to be, as it is easy to demonstrate that they are, in many instances, unreasonably severe, and such as that the punishment bears no proportion to the crime, it must surely follow, that the strict execution of them is neither expedient nor even possible.

In order to judge of the good sense and propriety of this writer's doctrines, it will be necessary, in the first place, to take a view of those laws, which are the subject of his panegyric, and which, he tells us, " he doubts whether any
 " other human system could equal
 " for

“ for the suppression of public
 “ injury (8).” To descend to
 minute particulars would be put-
 ting the patience of my readers to
 a too severe, and an unnecessary
 trial; for a very transient view will
 suffice to discover the absurdity
 and inhumanity of the system, if
 that name can with any propriety
 be given to a mass of jarring and
 inconsistent laws, which are severe
 where they should be mild, mild
 where they should be severe, and
 which have been, for the most
 part, the fruits of no regular de-
 sign, but of sudden and angry fits
 of capricious legislators.

(8) *Thoughts, &c.* p. 133, 1st edit. 139,
 2d edit.

Upon

In entering upon this task, the first thing which strikes one is this “melancholy truth, that, “among the variety of actions, “which men are daily liable to “commit, no less than a hundred and sixty have been declared by act of parliament to “be felonies without benefit of “clergy; or, in other words, to “be worthy of instant death (9).”

When we come to enquire into the nature of the crimes of which this dreadful catalogue is composed, we find it contain transgressions, which scarcely deserve cor-

(9) 4 Blackst. com. 18.—The number of felonies has been considerably increased since that author wrote.

poral punishment, while it omits enormities of the most atrocious kind. We find in it actions, to which nothing but the terror of some impending danger to the state could ever have given a criminal appearance (10), and obsolete offences, whose existence we learn only from those statutes, which are still left standing as bloody monuments of our history, though the causes

(10) 35 Eliz. c. 1. § 3. 35 Eliz. c. 2. § 10. 39 Eliz. c. 17. It is to such laws as these that one may apply the observation of my lord Bacon, that "there are a number of "ensnaring penal laws which lie upon the "subject; and, if in bad times they should be "awaked and put in execution, would grind "them to powder." *Proposal for amending the laws.*

C

which

which gave rise to them have long since ceased (11). On the one hand, we see the invasion of a man's property, though but to a small amount, and unaccompanied by violence, treated as the greatest of all enormities. To steal a sheep or a horse, to snatch a man's property out of his hands and run away with it, to steal to the amount of forty shillings in a dwelling-house, or to the amount of five shillings privately in a shop, nay, to pick a man's pocket of the value of only twelve pence farthing (12), are all crimes punish-

(11) See 43 Eliz. c. 13. 27 Eliz. c. 2.
9 Ann. c. 16. 9 Geo. I. c. 22.

(12) 8 Eliz. c. 4. 2 Hale's P. C. 366.

able with death. On the other hand, for a man to attempt the life of his own father is only a misdemeanor: to take away another's life, and to brand his name with ignominy, by a premeditated perjury, is not considered as murder, nor thought deserving a capital punishment (13): to stab another, under circumstances of the blackest malice, if the unfortunate object should, after a long and painful illness, recover of his wound only to breathe out the rest of his days in torment and disease, is punishable only by fine and imprisonment: to burn a house, of which the incendiary happens to have a lease,

(13) Foster, 131.

though it be situated in the centre of a town, and consequently the lives of hundreds are endangered, is liable to no severer punishment (14). If we look into the legal definition of crimes, we discover still grosser inconsistencies: we find, that under certain circumstances a man may steal without being a thief, that a pick-

(14) It has sometimes happened, that a man, who has committed a very atrocious crime, has been hanged for a circumstance attending the perpetration of it which was perfectly innocent. Thus a servant, who had attempted to murder his master, by giving him fifteen wounds upon the head, and different parts of his body, with a hatchet, was convicted, and executed, not as an assassin, but as a burglar, because he had been obliged to lift up the latch of his master's door to get into his chamber. Hutton, 20. Kel. 67.

pocket

pocket may be a highway robber, a shoplifter a burglar, and a man who has no intention to do injury to the person of any one a murderer : that to snatch a watch out of a man's pocket in the street is a highway robbery (15) : that to steal fruit ready gathered is a felony ; but to gather it and steal it is only a trespass (16) : that to force one's hand through a pane of glass, at five o'clock in the afternoon, in winter, to take out any thing that lies in the window, is a burglary, even if nothing be actually taken ;

(15) At the sessions held at the Old Bailey in last July, a child was tried for this species of highway robbery committed upon a porter : the fact was proved beyond all doubt, and the jury acquitted the prisoner.

(16) 3 Inst. 109. 4 Rep. 19. b. Yelv. 34.

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though

though to break open a house with every circumstance of violence and outrage, at four o'clock in the morning, in summer, for the purpose of robbing, or even murdering the inhabitants, is only a misdemeanor : that to steal goods in a shop, if the thief be seen to take them, is only a transportable offence ; but, if he be not seen, that is, if the evidence be less certain, it is a capital felony, and punishable with death : that, if a man firing at poultry with intent to steal them, inadvertently kill a human being, he shall be adjudged a murderer, and suffer death accordingly (17). Such are the laws which we are told “ a stranger cannot read with-

(17) 3 Inst. 56. Kel. 117.

“ out

“ out imagining us to be the
 “ happiest people under the sun,
 “ or without admiring the dispo-
 “ sition of the whole, as well as
 “ the adapting of every part for
 “ the public good (18).” Such
 are the laws which the judges are
 exhorted to enforce with the ut-
 most rigour, and which are repre-
 sented as requiring no revisal (19),

(18) *Thoughts*, &c. p. 16.

(19) The author of the *Thoughts*, says,
 it is true, that “ as a friend to examination
 “ and revisal of all kinds, he should not be
 “ sorry to hear, that a revisal of our penal
 “ statutes was in agitation, because it is
 “ better that the laws should be altered into
 “ something less severe, than not be executed”
 as they now stand; that is, of two evils it is
 best to chuse the least: but at the same time he
 intimates it as his opinion, that no good could
 come of such a revisal. See p. 132, 3, 4.

notwithstanding those laws themselves thus proclaim their own absurdity, and call aloud for reformation.

It will be unnecessary for me, however, upon the present occasion, to speak of the defects of those laws, any otherwise than as they are unreasonably severe; for it is that defect alone which can be remedied by the execution of the laws; and, in treating of that defect, I shall not, with the Marquis of Beccaria, and the many writers who have adopted his humane principles, contend that the punishment of death ought not, and cannot legally be inflicted by the legislature for any crime committed

ted under any circumstances; but this appears to me abundantly clear, that death cannot be inflicted for a mere invasion of property, consistently with reason and justice, nor without a gross violation of the laws of nature (20), and the precepts of our religion. Between a sum of money and the life of an individual, there is no proportion, or, to speak more accurately, they are incommensurable. This observation has been sometimes made with a kind of

(20) *Lex jus necis non habet in omnes cives ex quovis delicto, sed demum ex delicto tam gravi ut mortem mereatur.* Grot. de jure bel. lib. 2. c. 1. § 14.

compassionate

compassionate triumph over the folly and ignorance of our barbarous ancestors, who punished the crime of murder by a fine, payable to the king, and to the relations of the deceased (21); and yet we surely have far more reason to blush than to triumph,

(21) *Les attentats contre la vie d'un homme ont été jugés, avec raison, les plus contraires au but de la société, & ont été punis avec la plus grande rigueur chez toutes les nations policées. Il ne convenoit qu'à des barbares de se jouer de la vie de l'homme, en la compensant avec de l'argent. Principes de la législation universelle : Amsterdam, 1776. tom. i. p. 168.—Ce n'est que la férocité & l'ignorance de nos barbares ancêtres, qui a pu imaginer de mettre un taux à la vie de l'homme, & de convertir le châti- ment dû au meurtre, en amendes pécuniaires évaluées on bétail. Ibid. p. 191.*

since the same observation applies much more forcibly to the laws subsisting in this enlightened, and, as it is called, this philosophical age.

All punishment is an evil, but is yet necessary, to prevent crimes, which are a greater evil. Whenever the legislature therefore appoints for any crime a punishment more severe than is requisite to prevent the commission of it, it is the author of unnecessary evil. If it do this knowingly, it is chargeable with wanton cruelty and injustice; if from ignorance, and the want of a proper attention to the subject, it is guilty of a very criminal neglect. If these principles

principles be just, the legislature of Great Britain must, in one or other of these ways, be culpable, unless it be impossible to prevent theft by any punishment less severe than death. The author of the "*Thoughts on executive justice*" seems to think, that it is impossible, and that these severities are therefore to be justified on the ground of necessity. But experience shews the erroneousness of this opinion, because in several European states, where the punishment of death is never inflicted but for the most atrocious crimes, these lesser offences are very rare; while in England, where they are punished with death, we see

see them every day committed (22); and when, in the reign of Henry the eighth, so many criminals were executed, that their numbers were computed to amount to two thousand every year, crimes seemed to multiply with the number of executions. “ So
“ dreadful a list of capital crimes,” says mr. justice Blackstone, after having lamented that they are so numerous, “ instead of diminish-

(22) The reason, it will be said, is because the laws in England are not executed; but it is inseparable from the nature of too severe laws, that they should not be executed. *Draconis leges, quoniam videbantur impendio acerbiores non decreto jussuque; sed tacito illiteratoque Atheniensium consensu obliterate sunt.* Aul. Gell. lib. 11. c. 18.

“ ing,

“ ing, increases the number of of-
 “ fenders (23).” Nor is this a
 phænomenon very difficult to be
 accounted for: in proportion as
 these spectacles are frequent, the
 impression which they make upon
 the public is faint, the effect of
 the example is lost, and the blood
 of many citizens is spilt, without
 any benefit to mankind. But this
 is not all; the frequent exhibition
 of these horrid scenes cannot be
 indifferent: if they do not reform
 they must corrupt (24). The
 Spectators

(23) 4 Blackst. com. 18.

(24) *Carnifex, & obduſio capitis, & nomen
 ipſum crucis, abſit non modo a corpore civium
 Romanorum, ſed etiam a cogitatione, oculis, auri-
 bus.*

spectators of them become familiarized with bloodshed, and learn to look upon the destruction of a fellow-creature with unfeeling indifference. They think, as the laws teach them to think, that the life of a fellow-citizen is of little value (25); and they imagine they see revenge sanctified by the legislature,

bus. Harum enim omnium rerum non solum eventus atque perperessio, sed etiam conditio, expectatio, mentio ipsa denique, indigna civis Romano atque homine libera est. Cic. pro C. Rabirio, 5.

(25) How different was the policy of the Roman republic! The life of a citizen was there thought so valuable, that to put him to death was almost a parricide (*propè parricidium necare*); and the act of saving a life so precious was rewarded with one of the noblest

legislature, for to what other motive can they ascribe the infliction of the severest punishments for the slightest injuries? And, where the moral character of a people is depraved, crimes must be frequent and atrocious.

But even were it proved, that no other laws than those which seem with death are effectual to prevent these lesser crimes, it would not therefore follow, that the legislature is justified in enacting such laws. “ Though the

blest honours of the republic, a civic crown. Can one be surpris'd that policies so unlike have produced such contrary effects? that at Rome every bosom glowed with patriotism, and that at London public virtue is become a jest?

“ end

“ end of punishment be to deter
 “ men from offending, it never
 “ can follow from thence, that it
 “ is lawful to deter them at any
 “ rate, and by any means (26).”

If the offence be such that the mischief of it is not of equal consideration with the life of a man, it will be a very poor apology indeed for these solemn murders, to say, in the words which this writer adopts, that “ the terrour of the
 “ example is the only thing proposed ; and that one man is *sacrificed* to the preservation of
 “ thousands (27).” For, if he,

(26) 4 Blackst. com. 10.

(27) *Thoughts, &c.* p. 121, 1st edit. 122, 2d edit.

D

who

who is guilty in but a small degree, may be made a victim to the public by being subjected to punishments, to which his offence bears no proportion, why may not he, too, who is perfectly innocent, be sacrificed on the same altar of the public, whenever such an expiation shall be thought requisite? What principle can be urged in support of this doctrine, which would not have completely justified the high priest Caiaphas, when he declared of the most virtuous of men, who stood without reproach, though a host of enemies were leagued against him, "that it was expedient that one man should die for the people," and

“ and that the whole nation perish not (28) ?” And who are those *thousands*, for whose preservation this sacrifice is to be made ? If they be those whom the example may possibly deter from committing the same crimes, which would lead to the same fate, the argument is fallacious, and takes for granted the very point in question, the necessity of punishing those crimes with death.

We are told, however (29), that,

(28) St. John, ch. xi. v. 49 and 50. Upon which passage Grotius has this observation : *Descriptio ingenii ejus generis, quos vulgo politicos vocant, qui, honesto atque justo insuper habito, nihil præter utilitatem spectant, nec aliud in ore habent.* Annot. in lib. Evang. .959.

(29) *Thoughts, &c.* p. 117, 1st edit. 124, 2d edit.

the law being of public notoriety, those, who incur its penalties, do it voluntarily, and have therefore no reason to complain. But before this doctrine was advanced, it ought surely to have been proved, that justice and morality are matters of positive institution; for otherwise how is a law the less unjust for being universally known? If the *fiat* of any earthly legislators can establish rules of morality, what right had the poor Muscovite to complain, who was executed for wearing his beard, when the law had prohibited that rude but natural ornament? or why should the miserable Japanese murmur, when he is put to a cruel death

death for having risked a few pieces of silver at some game of chance? *Jam vero illud stultissimum existimare omnia justa esse quæ scita sint in populorum institutis aut legibus* (30). And yet it is given us as the opinion of my lord Bacon, “that it is no matter what the law is, so it be known what it is” (31);” though in what part of his works that extraordinary man disgraces himself by such a sentiment we are left to guess, possibly because the context, had it been referred to, might have explained away all the mischief of

(30) *Cic. de leg. lib. i. c. 15.*

(31) *Thoughts, &c. p. 118, 1st edit. 125, 2d edit.*

the doctrine, and have shewn that it related only to those civil regulations, which must always, in a great degree, be positive and arbitrary. But no matter whose the opinion is ; for no authority, however great, will ever be able to persuade mankind, that penal laws ought to constitute a science merely of memory, and not of reason. If laws operate in violation of the feelings and understandings of men, they are unjust and unwise, by however legitimate an authority they were enacted ; if they be repugnant to the character of a nation, they must remain unexecuted, by whatever regulations they are sought to be enforced.

Or

Or were the doctrine true, that no man, having full notice of a law, has a right to complain of the severity of the punishment which he suffers, in consequence of his having violated that law, it would still be inapplicable to the people of this country; for, though all our laws may certainly be known, and may perhaps be understood, by those who have leisure, capacity, and inclination to apply themselves seriously and industriously to so laborious a study; yet they as certainly are not, and cannot be known to the vulgar (32), to whom

(32) Anciently, at the end of every session of the parliament, all the statutes which had

whom that knowledge is most important ; because it is the hardy crimes which want and ignorance suggest, that are chiefly the

been enacted in it were transmitted to the sheriff of every county in England, together with a writ commanding them to promulgate those statutes throughout their bailiwicks ; and the sheriffs, in obedience to this writ, caused the statutes to be proclaimed at their county courts ; but some time after the invention of printing was brought into England, this practice was disused, and the statutes have never since been promulgated by any other means than by printing (4 Inst. 26). And yet, till the 5th year of the reign of Queen Ann, those who could read, and who consequently might be presumed to have knowledge of the law, were only burned in the hand for crimes which were punished with death in those who could not read, and who might therefore well be supposed ignorant of the law.

objects

objects of criminal laws ; and not those timid and subtle frauds, which are the fruits of a refined education, and of artificial desires ; though both are alike injurious to individuals, and pernicious to society. It is true, that every year an immense volume of statutes is printed and publicly sold ; but it might as well not exist, for the multitudes throughout the kingdom, who have not money to purchase it, time to peruse it, or capacities to understand the technical and mysterious language in which it is composed (33). Other statutes, indeed, are

(33) “ There is such an accumulation of
 “ statutes concerning one matter, and they so
 “ cross

are heard of while they are only in agitation, and during every stage of their passing into a law; but it is far otherwise with penal acts; for, agreeably to the genius of modern politics, which estimate

“cross and intricate, as the certainty of law is lost
 “in the heap.” *Bacon, proposal for amending the
 laws.*—“This continuall heaping up of lawes
 “without digesting them, maketh but a chaos
 “and confusion, and turneth the lawes many
 “times to become but snares for the people,
 “as was well said, *Pluet super eos laqueos; non
 “sunt autem peiores laquei, quam laquei legum.*”
*Bacon. Speech on a motion concerning a union
 of lawes.*—How much this accumulation and
 intricacy has been increased since the time when
 Sir Francis Bacon wrote, may be conjectured
 from this single circumstance, that all the sta-
 tutes prior to his time are comprised in two
 volumes, whereas those which have been passed
 since are hardly contained in eleven.

property

property far above life, though scarce a tax bill escapes solemn and repeated discussions in parliament, yet every novice in politics is permitted, without opposition, to try his talents for legislation, by dealing out death among his fellow-creatures; and laws of this kind commonly pass as of course, without observation or debate. Having thus stolen into existence, they lie dormant in the statute book, till they are notified to the world by the execution of some unthinking wretch, who, to his utter astonishment, finds himself by law adjudged to die. Though even this can hardly be considered as a promulgation of the law; for who has curiosity or leisure to enquire

enquire what has been the crime of every individual among the multitudes that are executed? Let me not, however, be supposed to accuse either those who make, or those who execute the laws, of any design to conceal them from the people. Their only crime, undoubtedly, is gross neglect; but at the same time one is forced to confess, that negligence in legislators or governors is often as baneful as the most active tyranny. No matter whether ingenious malice inscribe laws in small characters, and upon tablets which the eye can scarcely reach; or negligence couch them in unintelligible language, and plunge them into a voluminous farrago of legislation; since,

since, in both cases alike, the people are left in a fatal ignorance of those rules, by which they are bound to regulate their conduct.

The maxim, that ignorance of the law shall not excuse, may, perhaps, be justified on the ground of necessity; for very few criminals could possibly be convicted, if it were first requisite in every case to prove that they had actual notice of the law: but yet, those who have been frequently present at the trials of prisoners must have had occasion to observe, that the presumption, on which this maxim is founded, is often contrary to fact.

The writer of the pamphlet, however, gives himself little pains

to

to prove the efficacy or the necessity of those severe punishments, which he so much approves, but contents himself with observing, that "the regular, sober, and virtuous part of society has nothing to fear from the severity of the laws, but they have much to hope for (34)." The same observation might be used, with equal force, to take off the edge of men's indignation against the torture, in those countries where it still forms an essential part of the criminal procedure; for the regular, the sober, and the virtuous are little likely to be ever stretched upon the rack. It might be employed to dissuade men from

(34) *Thoughts, &c.* p. 3.

anxiously and strenuously asserting their right to the trial by jury; since the lives, the liberties, and the honour of the sober and virtuous very rarely depend upon a verdict of their peers. There had been much more truth, however, in the observation, if the writer, in lieu of those fine epithets, the *regular*, the *sober*, and the *virtuous*, had said the *wealthy* part of society has nothing to fear from the severity of the laws. To cheat a man of his whole estate at play, to murder his peace of mind by seducing the affections of his wife, to bring down the grey hairs of age with sorrow to the grave by debauching a beloved and only daughter,

daughter, to sell a nation's dearest interests for a breath of popularity, or for the prostituted smiles of a minister (35); though they are some of the blackest crimes which disgrace human nature, will never lead the authors of them to answer before a criminal tribunal. And yet to hear this writer's indignant exclamation against the monstrous wickedness of the "barbarous and injurious villains (36)" who destroy our horses or our sheep, and his la-

(35) *Fures privatorum furtorum in nervo atque in compedibus etatem agunt: fures publici in auro atque in purpura.* Cato apud Aul. Gell. lib. xi. c. 18.

(36) *Thoughts*, &c. p. 39. note, 1st edit. p. 42. note, 2d edit.

mentations

CRIMES OF WHICH

Sed mala tollet anum vitiato melle cicuta.

09-27-2016

lible,

lible, that the most regular, the most sober, and the most virtuous have nothing to dread from the severity of the laws ; since, even in this country, where the writer seems to think the prevailing mode of trial so unreasonably favourable to the prisoner (37), men have been executed for crimes of which they were perfectly innocent. But were it proved that wrong judgments are impossible, and that the guilty alone can fall under the animadversion of the law, I would still deny the consequence which the

(37) See particularly his arguments against rejecting the testimony of accomplices unsupported by other evidence.

observation

observation implies, and would quote upon this author the sentiment which he himself professes to adopt, *humani nihil alienum*. The worst criminal is still a man, and as such entitled to justice ; the most irreproachable judge is no more than man, and therefore may at some time stand in need of mercy.

The writer has taken pains to collect together a great variety of instances of villains having abused the royal mercy ; and he does not seem to have found one solitary instance of a man's having been reclaimed by pardon, and saved from an ignominious death to become a useful and a worthy

member of society. Nor would it be very surprising if he knew of no such instance; because, in the history of the vulgar, as well as of the great, it is the daring and the profligate who make the most conspicuous figure. The crimes of the highwayman, and of the conqueror, of Cæsar, and of Cartouche, command the notice of mankind; while no regard is paid to the virtues of the peaceful patriot, or of the industrious mechanic, who never step out of the

Secretum iter, et fallentis semita vite.

The reformed thief, who sincerely resolves to atone for his past crimes by his industry, and
by

by the regular performance of all his social duties, from the moment he forms that resolution ceases to attract the public attention. It does not follow, therefore, because the writer has found no such instance, that many do not exist. One has lately appeared, where one would last have sought for it, even at the Old Bailey. In the year 1782 a man was convicted of a robbery, and was condemned to die; but, as there appeared in his case some favourable circumstances, his sentence was mitigated, and he was sent for seven years to work upon the Thames. In last May, however, he was again arraigned at the bar

of the court for having been found at large before the term of his punishment had expired, and was again condemned to die. And what, the writer of the *Thoughts* will probably exclaim, can be said in favour of so incorrigible a villain? — The facts proved upon his trial, and which are these: The moment he had escaped from the lighter, he addressed himself to a watchmaker, whom he entreated to teach him his business: the request was granted; and the fugitive applied himself to his new trade with such indefatigable assiduity, that in a few weeks he gained sufficient to support himself; and from that time, till the moment he

was

was taken, he had employed himself in such unremitting labour, that he had not stirred out of his room for eight months together (38).

Examples, however, of this kind the writer probably thinks so very uncommon, that they ought not at all to shake the opinion, which he seems to entertain, that all who suffer are incorrigible; for this is the only construction which can be put upon his motto, as applied to his system :

———— *immedicabile vulnus*

Ense recidendum, ne pars sincera trabatur (39) :

(38) Sess. pap. May 1785, p. 700.

(39) *Ovid. Met. lib. i. v. 190*; and see the title page of the *Appendix to the Thoughts, &c.*

the curtailed and mutilated sentence of a licentious poet, which this severe author does not disdain to place in the front of his appendix, as an authority decisive of this important question. He must however forgive me if I restore what he has omitted, and what few persons, I believe, besides himself, will think unimportant.

CUNCTA PRIUS TENTATA; *sed immedicabile
vulnus*

Ense recidendum, ne pars sincera trabatur (40).

Have all things then so unquestionably been tried, as to entitle this writer, without imputation, to suppress

(40) "It is, it must be owned, much easier
"to extirpate than to amend mankind: yet
"that magistrate must be esteemed both a
"weak

suppress the former, and to insist only on the latter part of the sentence. He will perhaps answer, that they have; and, because the punishment of working on the Thames “has been attended with
 “an increase of all kinds of villainy (41),” he will hastily infer, that it is impossible ever to employ convicts in public labours with any good effect. But is it a

“weak and a cruel surgeon, who cuts off every
 “limb, which, through ignorance or indolence, he will not attempt to cure.”⁴ Blackst. com. 17. The author might have found, in the poet whom he cites, a motto much better suited to the spirit of his work, than that which he has chosen.

Ibimus in pœnas, et qua vocat ira sequemur.

(41) *Thoughts*, &c. p. 75.

just

just or a fair deduction, to conclude, that these men never can be employed with any advantage to the public, upon any scheme that can be imagined, because only public inconvenience has been found to result from the trial of one plan, which was ill imagined, and ill executed? To pronounce that to be impracticable, which men have not perseverance or skill to put into practice, suits well enough with modern indolence and presumption; but betrays, in all cases, a deficiency of wisdom, and, in those where the lives and the eternal happiness of individuals are concerned, a total want of humanity.

The

The fact however is, that a plan for the punishment of criminals has not only been imagined, but has even been adopted by the legislature, which seems to be wholly unobjectionable (42). A plan, which unites the advantages of a charitable with those of a penal institution, and has in view that important end of punishment, which has been overlooked in almost all our other laws—the reformation of the criminal: for, at the same time that it promises

(42) See the statute 19 Geo. III. c. 74, which was drawn by sir William Blackstone and mr. Eden. Howard's *State of prisons* last edit. p. 470. Many of the ideas in this act have been much improved in the admirable plans of mr. Blackburne.

to subdue the fiercest and most ungovernable spirits by solitary confinement and continued labour, it would be a kind of asylum to that very large description of offenders, who are rendered such by the defects of education, by pernicious connexions, by indigence, or by despair. These it would keep apart from their infectious companions. It would instil into their minds principles of religion and morality, instruct them in useful trades, and furnish them with resources to become valuable members of society, when restored to their liberty. What it is that retards the execution of this excellent plan, it is not easy to conjecture;

ture ; for, though the expence of erecting the penitentiary houses would be considerable, yet that is surely but a trifling object, compared with the benefit which, as it should seem, must necessarily result to the country from such an institution. And, according to the calculations which have been made upon the subject, when the houses were once erected, the annual expence of maintaining them would be more than defrayed by the earnings of the convicts.

But to return to the "*Thoughts on executive justice*:" the principle, which the writer of them endeavours to establish, is, that the laws ought to be strictly executed,
in

in order that men may be deterred from committing crimes by the certainty of punishment. And there can be no doubt that, if it were absolutely certain that punishment would attend upon every crime, as its inevitable consequence, none would ever be committed, but those which are instigated by despair, or by the frenzy of some ungovernable passion; because every rational being does, unquestionably, in every action of his life, propose to himself some advantage, immediate or remote; but, if punishment were the certain consequence of crimes, no criminal could persuade himself, that by perpetrating his guilty designs
he

he would acquire any benefit to himself; but must know, on the contrary, that he would draw down a certain evil on his head. To suppose, that a man would violate the law under such circumstances, for the sake, perhaps, of some momentary enjoyment, is to suppose, contrary to nature, that he would knowingly swallow a deadly poison, because it was pleasing to the taste.

If such an absolute certainty could be established, it were the most wanton cruelty to punish with death any other crime than murder; for the gentlest penalties would then be sufficient to prevent all those crimes, which are
produced

produced by the desire of gain; since none would make such an attempt to gratify that desire, as he must know could end only in loss and disappointment: and a rational being will no more cut his finger than his throat, by design.

That an absolute certainty of punishment is, however, quite unattainable, is clear from this consideration alone; that punishment is inflicted in consequence of the judgment of men, and that men have only imperfect faculties, and are always liable to err. Neither the jury nor the judge can look into the heart of the prisoner: they must decide according to evidence,

evidence ; that evidence may be defective, and consequently the criminal may always nourish hopes that he shall not be convicted of the crime which he meditates. It is wild therefore to talk about establishing “ a certainty of suffering if men offend (43) ;” for the utmost that can be done is to lessen the probability which offenders have of escaping ; and when the question is, whether the existing laws shall be rigidly enforced, the matter chiefly to be considered is, whether the mischief, resulting from such a measure, would not far outweigh all the good that

(43) *Thoughts, &c.* p. 117, 1st edit. 124, 2d edit.

can be attained by cutting off some of a felon's hopes of impunity.

If the power of pardoning were abolished, and conviction doomed the convict to inevitable death, the chances against a criminal would be greater undoubtedly than they are at present, but there would still be a very considerable chance in his favour; and a thief, like a deluded gamester, will play on, even though the odds be against him. He can hardly be supposed to be so accurate a reasoner, or so exact a calculator, as this system presumes. He is hardly accustomed to reflect much on what is past, or to look forward very thoughtfully on what is to come.

come. His crimes and his tumultuous pleasures make up the business of his life, which is hurried on through one continued round of violence, riot, and dissipation: and the gallows, which tears his accomplice from him, inspires him with no other care than to find out some new companion. The state of mind of a criminal, in the moment of violating the law, is thus finely described by an historian, who was a perfect master of the human heart,

neque periculi nescius erat sed nonnulla fallendi spe, simul magnis præmiis opperiri futura, & præsentibus frui pro solatio habebat. With such a temper of mind, can it be sup-

posed, that a man will be prevented from committing any crime, because he has only three chances of escaping, where he once had four? and that this is all that can be expected from the measures which are proposed, a little reflection will evince. For the criminal who could not expect a pardon, would still have left other, and very fruitful sources of encouragement, and of deceitful hope. He might still flatter himself, that he should be able to elude all the pursuits of the officers of justice (44); that the men, whom he had robbed might not
recollect

(44) The history of the two brothers of the name of Weston, who, after having robbed the
mail,

recollect his person ; that compassion might prevent them from swearing positively against him ;

mail, baffled all that vigilant zeal in their pursuers, which was quickened by the very large rewards offered, both by the government and by the post-office, and established themselves securely in the country as farmers ; and the example of the notorious pickpocket, who has been repeatedly tried at the Old Bailey without being convicted, may be supposed to have at least as much influence on the conduct of robbers, as the story either of Patrick Madan, who was so often convicted and so often reprieved (*Thoughts*, &c. p. 92, 1st edit. 96, 2d edit.) or of that highwayman “ who,” we are told with the most immoral and most indecent jocularity, “ might console himself, like the heroic Portius, with saying,

“ ’Tis not in mortals to command success,
“ We will do more, Sempronius, we’ll de-
“ serve it.”

Thoughts, &c. p. 39, 1st edit. 63, 2d edit.

or that the jury might be touch-
 ed with pity, and acquit him in
 spite of the clearest evidence.
 The object therefore which this
 writer aims at is not to be attain-
 ed by the means which he recom-
 mends; and the consequence of
 adopting his system would only
 be, that much blood would be spilt
 to very little purpose. The truth
 of this assertion does not rest
 merely upon argument and proba-
 bility, experience proves it. The
 system so earnestly recommended
 has been tried, tried in this very
 country, and tried without the least
 success; for, in the cases of forgery,
 and robbing the mail, the law has
 been always executed with the ut-
 most severity, that the most un-
 feeling

feeling rigourist could wish (45), ministers being even afraid to pardon such offenders, on account of the clamours of trading people, governed by fordid passions, and by the rage of interest; and yet those crimes were never more frequent in England than they have been during the last twenty years. From this experience we may, I think, fairly conclude, that the measure, if adopted, could not be efficacious: let us, in the next place, see how far it would be just or legal.

It is proposed that the laws should be strictly enforced, that all their terrors should be awaken-

(45) This the author of the *Thoughts* himself admits. See the note p. 108, 2d edit.

ed, and their utmost severity called into action, and this, in the true spirit of a tyrant, when the people least expect it, and when they have been long lulled into security by the mild administration of justice : for no other promulgation of this resolution is proposed than its sudden execution. In what respect such a proceeding is less unjust, less illegal, or less inhuman, than an *ex post facto* law, I profess myself unable to discover. Uninterrupted usage constitutes law, nay, according to a maxim very familiar to lawyers, established errors become the law of the land (46). That mode which has

(46) *Communis error facit jus.*

long and uniformly prevailed, and which has been acquiesced in by those who have the power of controlling the executive magistrate, is certainly the legal and established mode of executing the law (47).

That

(47) How much the present manner of executing the law in this country is considered as the legal and constitutional mode of executing it, will appear from the following passage in a very distinguished writer, which I cite merely as it contains an exact history of the administration of justice in England, and not as by any means agreeing with the author, that of the two methods of administering justice which he mentions, that which we have adopted is the best. " There are two methods of administering penal justice. The first method assigns capital punishment to few offences, and invariably inflicts it. The second method assigns capital punishment to many kinds of offences, but inflicts
" it

That mode is notwithstanding now
to be laid aside, and a very different

“ it only upon a few examples of each kind.
 “ The latter of which two methods has been
 “ long adopted in this country, where, of those
 “ who receive sentence of death, scarce one in
 “ ten is executed. And the preference of this
 “ to the former method seems to be founded in
 “ the consideration, that the selection of proper
 “ objects for capital punishment principally depends upon
 “ circumstances, which, however
 “ easy to perceive in each particular case, after
 “ the crime is committed, it is impossible to enumerate
 “ or define beforehand, or to ascertain,
 “ however, with that exactness which is requisite
 “ in legal descriptions. Hence, although
 “ it be necessary to fix the boundary on one
 “ side, that is, the limit to which the punishment
 “ may be extended, by precise rules of
 “ law ; and also, that nothing less than the authority
 “ of the whole legislature be suffered to
 “ determine and assign these rules ; yet the mitigation

ferent and even a contrary mode
to be adopted in its stead, without
fo

“ tigation of punishment, the exercise of lenity,
“ may without danger be entrusted to the execu-
“ tive magistrate, whose discretion will operate
“ upon those numerous, unforeseen, mutable,
“ and indefinite circumstances, both of the crime
“ and the criminal, which constitute or qualify
“ the malignity of each offence. Without the
“ power of relaxation lodged in a living autho-
“ rity, either some offenders would escape capi-
“ tal punishment, whom the public safety re-
“ quired to suffer; or others would undergo
“ this punishment where it was neither deserved
“ nor necessary. For if judgment of death
“ were reserved for one or two species of crimes
“ only, which would probably be the case if
“ that judgment was meant to be executed
“ without exception, crimes might occur of the
“ most dangerous example, and attended with
“ circumstances of heinous aggravation, which
“ did not fall within any description of capital
“ offences,

so much as previous notice being
given to the public by a procla-
mation

“ offences, and consequently could not receive
“ the punishment their own malignity and the
“ public safety required ; and what is worse, it
“ would be known beforehand, that such crimes
“ might be committed, without danger to the
“ offender's life. On the other hand, if, to reach
“ these possible cases, the whole class of offen-
“ ces to which they belong be subjected to pains
“ of death, and no power of remitting this se-
“ verity remain any where, the execution of the
“ laws will become more sanguinary than the
“ public compassion would endure, or than is
“ necessary to the general security.

“ The law of England is constructed upon a
“ different and a better policy. By the number
“ of statutes creating capital offences, it sweeps
“ into the net every crime, which under any
“ possible circumstances may merit the punish-
“ ment of death ; but when the execution of
“ this sentence comes to be deliberated upon, a
“ small

mation from the crown. Even
they, who, a little before the com-
mencement

“ small proportion of each class are singled out,
“ the general character, or the peculiar aggrava-
“ tions of whose crimes render them fit examples
“ of public justice. By this expedient few ac-
“ tually suffer death, whilst the dread and dan-
“ ger of it hang over the crimes of many. The
“ tenderness of the law cannot be taken advan-
“ tage of; the life of the subject is spared, as
“ far as the necessity of restraint and intima-
“ tion permits; yet no one will adventure upon
“ the commission of any enormous crime, from a
“ knowledge that the laws have not provided
“ for its punishment. The wisdom and hu-
“ manity of this design furnish a just excuse for
“ the multiplicity of capital offences, which the
“ laws of England are accused of containing,
“ beyond those of other countries. The charge
“ of cruelty is answered by observing, that these
“ laws were never meant to be carried into in-
“ discriminate execution; that the legislature,
“ when

men-
 tement of the last war, ven-
 tured to advise the king to revive
 an obsolete statute of Henry the
 eighth, and to try men in England
 for treasons committed in foreign
 parts, yet thought it not advise-
 able to go all the lengths which
 this gentleman recommends, but

“ when it establishes its last and highest sanc-
 “ tions, trusts to the benignity of the crown to
 “ relax their severity, as often as circumstances
 “ appear to palliate the offence, or even as often
 “ as those circumstances of aggravation are want-
 “ ing, which rendered this rigorous interposition
 “ necessary. Upon this plan, it is enough to vindi-
 “ cate the lenity of the laws, that some instances
 “ are to be found in each class of capital crimes,
 “ which require the restraint of capital punish-
 “ ment; and that this restraint could not be ap-
 “ plied, without subjecting the whole class to
 “ the same condemnation.” *Paley’s Principles*
of moral and political philosophy, p. 531, & seq.

took

took care to temper the injustice of the measure by having it notified to the world, and notified in the most public and solemn manner, by an address to the crown from both houses of parliament. But in the present case, the subject not being one of those which are considered as of great political importance, nor of sufficient dignity to rouse the zeal of any opposition, it is probably thought that a previous promulgation may safely be omitted, as a vain and superfluous ceremony. And it is certainly true, that the gibbets, which are first loaded with the victims of this bloody resolution, will sufficiently publish it to the world ; but then it is not
easy

easy to conceive by what casuistry the executive power will acquit itself of the charge of having wantonly spilt the blood of those wretches, which its former relaxation will have ensnared, and made the prey of its present rigour.

But yet such a proceeding is represented by the writer as a kind of duty to the legislature, whose intentions he takes upon himself to say have been frustrated (48), and whose dignity he insinuates has been insulted (49) by the conduct of the judges: and yet that legislature has never expressed the slightest disapprobation of the

(48) *Thoughts*, &c. p. 13, 44, 1st edit. 45
2d edit.

(49) *Ibid.* p. 46, 1st edit. 48, 49, 2d edit.

mode in which the laws are now executed, although it must necessarily be presumed to be better acquainted with its own sentiments than any officious individual can be. There is the greatest reason to imagine, not only that the legislature does not disapprove, but on the contrary that it highly approves of the spirit in which the laws have long been executed. To suppose the legislature ignorant or indifferent upon such a subject, is to suppose it culpable in the extreme ; its silence therefore cannot be considered as negative, but must be construed into a sanction, and a warm approbation. *Dum tacet clamat.*

G

And

And indeed it is hardly possible to doubt, that the parliament had the clemency of the crown in its contemplation, when it passed all those modern statutes, by which new felonies are created; for that the legislators of an enlightened age, and of a nation boastful of its humanity, should punish the slightest offences with death, is not to be accounted for, but upon the supposition, that those punishments are only held out as a terror, and never intended to be inflicted but in the most aggravated cases.

The author of the *Thoughts on executive justice*, judging rightly that his system stood in need of
some

some other support than the arguments by which he has attempted to maintain it, endeavours to avail himself of some of the greatest authorities ancient and modern. The venerable names of Plato and of Cicero are resorted to for this purpose, though neither the philosopher (50) nor the orator (51) spoke of any other laws than those by which offences against proper-

(50) By the laws of Plato, theft was to be punished by a penalty of double the value of the thing stolen, or by imprisonment, if the thief were unable to pay the penalty. *Plato de leg. dial. 9.*

(51) The punishment of theft by the Roman law was a penalty, in some cases of double, and in others of four times the value of the thing stolen. *Aul. Gell. lib. xi. c. 18. Inst. lib. iv. tit. 1. § 3, 5.*

ty were punished only with pecuniary amercements. Montesquieu and Beccaria too are cited as approving this unmerciful doctrine, though both those writers contend that the laws should be religiously executed only where they are mild and equitable (52). The gentleman undoubtedly forgot, that one of those authors has very strenu-

(52) See Montesquieu *de l'esprit des loix*, liv. vi. c. 12. *de la puissance des peines*; and c. 16. *de la juste proportion des peines avec le crime*; and Beccaria *dei delitti e delle pene*, § 20. where he says, *la severità di un giudice inesorabile, per essere un' utile virtù, dev' essere accompagnata da una dolce legislazione.*—*Nel disordine del sistema criminale, il perdono e le grazie sono necessarie in proporzione dell' assurdità delle leggi, e dell' atrocità delle condanne*; and see § 15. *della dolcezza delle pene.*

ously

ously maintained, that it is both unjust and impolitic to inflict the punishment of death for any, even the most atrocious crimes (53); and that the other expressly approves of the very practice established here, which this writer so strongly reprobates, that of mitigating the punishment of robbers (54). Little did the benevolent Beccaria think, while he was composing his work, of which every sentence was dictated by a spirit of humanity, and for which he desired no greater reward than the blessings and the grateful tears of

(53) *Dei delitti e delle pene*, § 16. della pena di morte.

(54) *De l'esprit des loix*, liv. vi. c. 16.

some victim rescued by him from judicial tyranny and injustice (55); little did he think that the time would ever arrive, when his name would be cited as an authority to confirm and to invigorate that tyranny and that injustice; when his book would be made the instrument of extending all the evils of those systems of criminal law, which he sought to reform; when all his principles, which favoured

(55) *Se sostenendo i diritti degli uomini, e della invincibile verità contribuissi a strappar dagli spasmi, e dalle angosce della morte qualche vittima sfortunata della tirannia o della ignoranza, ugualmente fatale, le benedizioni e le lagrime di un solo innocente nei trasporti della gioja mi consolerebbero dal disprezzo degli uomini. Dei delitti e delle pene, introd.*

humanity,

humanity, would be rejected, and those alone would be adopted, which, being applied to the existing laws, could serve but to aggravate their severities, and to multiply their mischiefs.

Undoubtedly, to render laws respected and efficacious, they must be strictly executed (56); but a far more indispensable requisite to that end is, that those laws be wise and just, for otherwise, the more rigorously they are enforced, the more they will be detested and despised. If we would have our laws invariably executed, we must first render them such, that all the

(56) *Thoughts, &c.* p. 132, 1st edit. 133, 2d edit.

wise and honest will join their wishes, and contribute their exertions, to have them observed ; and not leave them armed with such severities, that nature tells one it is a virtue to disappoint and to prevent their execution. In a despotic state it may perhaps be possible to execute the most unnatural laws with the most obdurate rigour ; but it will assuredly be impossible under an English government, as long as the nature of man endures, and some faint sparks of humanity remain unextinguished in his bosom. Were the judges to adopt this writer's principles, and to leave every man for execution who had been convicted

victed upon full evidence, the consequence would inevitably be, that much fewer criminals would be convicted. Juries would then take upon themselves to judge of the policy and justice of the law upon which every prisoner was indicted; and all those evils which the writer so well describes, in the beginning of the second part of his work, would be infinitely multiplied, for jurors would easily quiet their consciences upon a perjury which was the means of preventing murder. Those witnesses, who come into courts of justice, thirsting for the large rewards which the legislature or the government holds out to them, might

might still, it is probable, be officious to discharge their gainful duty; but few other persons would consent to appear in the characters of prosecutors, or of witnesses, where they must be instrumental in, what they would consider as, acts of solemn injustice and cruelty. And thus offenders, instead of suffering, as they now do, a milder punishment than the law prescribes, would be left in most cases to enjoy complete impunity (57).

Nevertheless,

(57) This is the effect which the rigid execution of the law has produced among the French, if we may believe one of their own magistrates. Speaking of the law by which a servant who robs his master is punished with death,

Nevertheless, I will readily agree with the writer, " that something should be done, or we may apprehend much worse consequences than we have hitherto experienced (58)." But that something is not what he has pointed out, and it is the more

death, he says, *Cette loi si dure s'est corrigée par elle même : l'horreur de voir un gibet à sa porte, et la crainte de la haine et des malédictions publiques, arrêtent la plainte des maîtres ; et l'excès même du châtimement a produit l'impunité d'un vol, qu'une loi plus modérée eût infailliblement réprimée.* Discours sur l'administration de la justice criminelle, par m. Servan, avocat général à Grenoble. Lyon 1774, p. 96 ; and see *Observations concernant l'exécution de l'article ii. de la déclaration sur le vol.*

(58) *Thoughts, &c.* p. 123, 1st edit. 128, 2d edit.

important

important that the public should know it is not, because, by a strange infatuation, he endeavours to damp all other projects, and fondly insists that his, and his "alone, can deliver us from our "present dreadful situation (59)."

As to the most effectual, but what he is pleased to call "the subordinate means of preventing crimes, "such as encouraging industry, "and diminishing the sources of "vice and dissipation," these he dismisses with the contemptuous epithet of "palliatives," and with telling us, "that he fears "they will not now avail (60);"

(59) *Thoughts, &c.* p. 87, 88, 1st edit. 92, 2d edit.

(60) *Ibid.* p. 78, 79, 1st edit. 82, 2d edit.

though,

though, I believe, it is the first time that a remedy, which strikes at the root of the evil, was stiled a palliative, or that a man, presuming to think his arguments might influence the public opinion, ventured to declare, that it was more important to punish crimes than to prevent vices. But however lightly he may pass over this topic, few of his readers, I believe, will think it undeserving a little more attention. His assertion "that it is most of all to be wished, that crimes might be lessened by prevention (61)," no man can dispute; but at the same time who can go on with him to say, that

(61) *Thoughts, &c.* p. 10.

the

the most likely means of prevention are “ the fears of severe punishment ? ” Ought it not rather to be said, that the most likely means are, to preserve uncorrupted that large but unfortunate description of persons, who, being born in misery and indigence, and differing from us in nothing but the accidents of rank and fortune, are entitled to our utmost care and protection ? For, if we negligently suffer a thousand sources of profligacy, and encouragements to vice to surround these helpless creatures on every side, what a refinement of cruelty is it to hang the thieves and profligates whom we have made, and

whose only crime was, that they had not such uncommon philosophy and resolution as to be able to resist the temptations with which we have ensnared them (62)? The writer who is much relied on, in the *Thoughts on executive justice*, for a purpose, with respect to which he is not so good an authority as he is for the present, because, I believe, it will be generally allowed, that he posses-

(62) The Chinese consider a man's vices as his misfortunes, and as the effects of the bad education which he has received, and therefore punish his crimes upon the head of his father, whom they deem the real author of them. This principle might with equal reason be extended farther, and the crimes of the poor be punished upon the rich, who are their natural fathers and guardians.

fed

fed the qualities of a magistrate in
 a much more eminent degree
 than those of a legislator, was so
 sensible of the importance of pre-
 venting the disorders, which are
 suffered in the lowest ranks of
 life, that he does not scruple to
 own, notwithstanding he is so stern
 an advocate for not pardoning
 convicts, that, considering the lit-
 tle attention which is paid to this
 particular, "it is a wonder that we
 " have not a thousand more rob-
 " bers than we have;" and that
 the circumstance of all the wret-
 ches whom he describes as har-
 boured in gin-houses and miser-
 able brothels, not being thieves,
 " must give us either a very high
 " idea

“ idea of their honesty, or a very
 “ mean one of their capacity and
 “ courage (63).” That this evil
 is rather increased than diminished
 since that author wrote, will
 not, I believe, be disputed. Nor
 will it be questioned, that it is as
 much our interest, as it is our
 duty, to remove that evil; for,
 till that be done, crimes must be-
 come every day more frequent, and
 that property, which we so highly
 value, every day more insecure.
 The means of removing it are
 plain and obvious—to supply the
 poor with employment; to pre-
 vent them from plunging into

(63) *An enquiry into the cause of the late in-
 crease of robbers, &c.* by Henry Fielding, esq;
 P. 143.

H

drunken-

drunkenness, gaming, and idleness, which are the forerunners of every other vice ; and, above all, to suppress those disorderly houses and seminaries of thieves, which are notorious to all the officers of the police, but which it is the interest of all of them should continue, and should thrive. But to effect all this, one of two things is absolutely necessary ; either gentlemen of character, of property, and of education, must in every part of the kingdom undertake the very important duties of justices of the peace (for by such alone can those duties be properly discharged) or some different system of police from that which now prevails must be established.

To

To suppose that they, who make the office of a justice of the peace a lucrative employment, will ever execute that office properly, is to suppose, that men engaged in a profitable trade will exert themselves to the utmost to ruin that trade, or to abridge its profits. That a mercenary justice sincerely wishes the reformation of the lower ranks of mankind, is what no one can imagine, but he who is credulous enough to believe, that there are African traders, who in their hearts lament the hardships and cruelties which negro slaves undergo.

If indeed persons of the description which I have mentioned

cannot be found to act in the commission of the peace, some other system of police must be resorted to. Not, however, a system confined merely to the metropolis, as if it were matter of indifference what vices were suffered to range through every other part of the kingdom ; nor one supported only by extraordinary and formidable powers lodged in the hands of new-erected magistrates appointed by the crown ; but some general and permanent system, founded upon the principles of our ancient constitution.

I am not so visionary as to flatter myself, that the police of Alfred's days can now be revived ; and to
 desire

desire that every man should be considered as a kind of surety for the good behaviour of his family, and his neighbours: but, at the same time, I cannot but think that the principles of that ancient system, namely, the reposing a confidence in the people themselves, the giving them the nomination of the ministers of justice (64), and the making every father of a family the guardian of the public peace and safety within his own little sphere, must be adhered to, as closely as the present or-

(64) Both the sheriffs and the justices, or, as they were then called, the conservators of the peace, were elected by the freeholders of counties so late as in the reign of Edward II.

der of things will admit, in any plan of police which can be carried into execution in this country with safety, or even with effect.

A system of power in officers to be appointed by the crown, to say nothing of the dangers to the liberty of the subject inseparable from it, must always encounter innumerable obstacles in the execution. Such a system must ever, in a free country, be regarded by the people with jealousy, and a thousand unforeseen difficulties must, from that single circumstance, start in its way, to thwart and interrupt its execution. The best citizens, and the most conscientious men, would be found to rejoice

rejoice in its disappointment; and the most desperate villains, who suffered its unconstitutional severities, would soon be considered as the martyrs of a cruel persecution. However great and inordinate the powers with which the officers of such a police might be armed, they would in the end be found insufficient. Those very powers, rendering the persons who possessed them the objects of suspicion, and perhaps of public detestation, would make other and still more extraordinary powers necessary, till all the precautions, all the restraints, and all the severities of the most jealous tyranny were one by one established. In a

word, if the police of France is to be adopted, it must be adopted throughout : to leave out of such a system the employment of spies and of soldiers, is to omit that part of it on which the success of the whole depends. A system, which betrays the greatest distrust of the people, must never look for popular support ; all that it can expect from the public is a constrained and reluctant obedience. Such is the case in France, where their *commissaires*, their *lieutenants*, and *intendants de police*, supported by all their train of subalterns, by all their avowed and all their disguised instruments, their *archers*, their *exempts*, and their *marechaussee*,

see, and aided by all the military power, and by their *espions* of every description, prove that unhappy government to be under the miserable and the disgraceful necessity of constantly making both an open and an insidious war upon the people.

Another thing essentially requisite (more so indeed than all the rest) to the prevention of crimes is, what I have before mentioned, and what I must be permitted again to insist on, a total revision and reformation of our penal laws. How it has happened that that work has never yet been executed, is indeed difficult to conceive. It can hardly have arisen from

from any distrust of their own abilities for such a task, in those whose peculiar duty it is to undertake it; because, although to compose a perfect criminal code, or, in the words of Solon, "the best that the country can bear," is an enterprize requiring such talents as it would be flattery to compliment any of our ministers, or of our leaders of opposition, with possessing; yet to correct many of the grossest absurdities in our laws, to make them much less inconsistent, much less obscure, and much less inhuman, than they are, is a task to which abilities greatly inferior to those we see every day exerted in interested pursuits,

pursuits, would be fully equal. It is impossible therefore to ascribe the long existence of this evil to any other cause than to that fatal indifference for the public good, which has unhappily so wide an influence, and which those very laws contribute in a great degree to propagate. One may hope, however, that a sense of the inconveniencies, which the public at this moment labours under from frequent frauds and outrages, may at last overcome this lethargy, and awaken men to the true source of these calamities. But whether it do or not, this may safely be pronounced; unless the penal laws be reformed, all those evils

which the public feels, and which the writer of the *Thoughts* recites and exaggerates, must infallibly continue and increase, even though the practice should be unrelentingly persisted in of hanging up ten or twenty criminals every six weeks in the metropolis, and though in the country the judges circuits should every where be marked with blood, and they should carry, as we are told “the constitution intended they should carry, terrour and astonishment into the minds of all (65)”.

Let me not, however, because I assert that the principal defect of

(65) *Thoughts*, &c. p. 25.

justice

justice in this country is in the laws themselves, be therefore understood to maintain that the administration of those laws is perfect. This is what I am so far from thinking, that I could point out many very capital defects in it. One, which most immediately calls for redress, is the great length of time which is suffered to elapse between the crime and the punishment. In no part of England, but the county of Middlesex, are there more than two assizes held in every year, and those at such unequal distances, that a man who is the object of a prosecution may lie eight months in prison before he is brought to trial. This grievance is still greater in the four northern

northern counties, for there they have only one assize in a twelve-month; and in the town of Hull (incredible as it may seem) the assizes are seldom held more frequently than once in the course of three years (66). The conse-

(66) I have been informed by a gentleman who goes the northern circuit, that at the last assizes held at Hull, a man was convicted of some offence, for which the judge said he should never have punished him with more than six months imprisonment; and this poor wretch had lain above two years in jail before he was brought to trial. An instance as striking, though of a different kind, of the evils resulting from this delay of justice, is mentioned by Mr. Howard. One Peacock, a murderer, was kept a prisoner in Kingston jail almost three years before he could be tried; in the meantime the principal witness against him died, and he was necessarily acquitted.

State of prisons, p. 15.

quence

quence of executing the sentence so long after the commission of the crime, has been well observed, by the marquis of Beccaria, to be that of rendering the example of the punishment nearly useless. When the sentence is executed, the crime has been long forgotten. The spectators seem to contemplate, not the punishment of a criminal, but merely the death of an individual; and the sentiments with which they go away impressed, are, not of the justice of the law, and the danger of violating it, but of compassion for a fellow-creature, to whose sufferings they have been witnesses (67). But

(67) *Dei delitti e delle pene*, § 19. *Della prontezza della pena.*

there

there is another, and surely a much more important reason why the trial of a prisoner ought to follow much sooner after the perpetration of the crime, namely, that it is always possible that the trial may manifest his innocence. The torture preparatory to trial, as it was formerly used in France, must fill every humane mind with horror; and yet a long imprisonment, previous to trial, proceeds upon the same principle, though it be attended with less cruelty, for in both cases punishment is first inflicted, and then an enquiry is leisurely made, whether the unhappy creature who suffered it were innocent or guilty. After having

having been deprived for six or eight months of his liberty, and punished, during that whole period, with all the complicated horrors of a jail, a poor wretch is at last brought to trial before a jury, who upon their oaths declare him to be perfectly innocent. He then finds (his character indeed cleared from all suspicion, but) his health destroyed, his means of gaining a livelihood irrecoverably lost, and his family pining in some workhouse, to which shame and misery have driven them for refuge.

This defect in the administration of justice is sometimes palliated by what is in itself a very great defect, the trial of many
 I prisoners

prisoners at the quarter sessions before justices of the peace. For, though there certainly are in the commission some of the most respectable gentlemen in the kingdom; at the same time it must be confessed, that there are in it many men who are grossly ignorant, and others who convert, what they ought to consider as a laborious, but a very honourable duty, into a very advantageous traffic: and this to such a degree, that it may be said now, with much more reason than it was in the days of queen Elizabeth, that, when any considerable addition has been made to our penal laws, the parliament has done as much for the justices of the peace as if it

it had voted them a subsidy and two fifteenths (68).

But these evils in the administration of justice, and many more which might have been noticed, are all passed over by this writer without observation, though he does not disdain to point out how one of those, which he is pleased to call "legal and constitutional advantages," may be taken against men who are accused (69).

(68) D'Ewes's journal, p. 661.

(69) His words are these: "The times require that every legal and constitutional advantage should be taken against those who make themselves a public terrour." *Thoughts*, &c. p. 166, 1st edit. 172, 2d edit. But, as the advantage is taken before conviction, *non constat* that the man, against whom it is taken, has made himself a public terrour, all that can be said of him is, that he is a man accused.

Accordingly, he would fain persuade the judges to admit the testimony of accomplices, though unsupported by any other proofs. That such evidence is by law inadmissible, is a rule so long established, and so universally adhered to, that if any alteration is to be made in this respect, it ought certainly to be by the authority of the legislature, and not of the judges; but when the rule is considered, it will be found, I believe, to require no alteration, or if any, one of a very contrary nature from that which the writer recommends; and that, instead of admitting the evidence of an accomplice under *any* circumstances, it ought to be admitted under

none.

none. There may be reason perhaps to doubt, whether the rule of law, by which persons under certain circumstances are excluded from giving evidence, sometimes on all, and sometimes on particular occasions, be a rule from which either the public or individuals derive any benefit; and whether it would not be more expedient, that no objections to the competence of a witness should prevail, but that only observation should be made upon his credit, so that no means should be shut out from a jury of obtaining light upon the question which they are to decide: but, however this may be, it should seem, that if the

present rule of evidence is to be adhered to in any case, it ought to be most especially where the incompetent witness is produced to give evidence against a prisoner; because, though the objection to such a man's credit be so strong that no humane or sensible jury will ever give any weight to his single testimony, yet the mere admitting him to relate his story does irreparable injury to the character of the prisoner. At any rate, it must be admitted, that, if the rule be suffered to prevail against the accused, it ought to have its full operation in his favour. If he be not permitted to prove an *alibi* by his wife, who is

the person most likely to be able to prove it, because she is incompetent, neither ought there to be received against him such evidence as falls within every principle upon which the incompetence of witnesses is founded. That an accomplice comes within them all cannot be doubted, when one considers, first, that he is a man guilty of one of those crimes, which incapacitate the authors of them from giving evidence upon any occasion; and, in the next place, that he has the strongest possible interest to give positive and direct evidence against the prisoner. To explain this more fully—By law, no man who stands

convicted of a felony can be a witness (70). Yet, where is the difference, whether a man have been found guilty of a crime by a jury, or whether he come himself be-

(70) This is to be understood of those cases only where the felon has not obtained a pardon, or has not been burned in the hand; for the legal effect of a pardon (and burning in the hand is held to amount to a statute pardon) is, not only to save the object of it from punishment, but to restore his credit, and make him once more an honest man. There is in the books a very curious case upon this subject. An action was brought against a man for slander, by calling a thief a thief, and the court held that the action was maintainable, because a general pardon had passed since the theft was committed, and a pardon takes away not only *penam* but *reatum*, the guilt as well as the punishment. Hob. 81. Gilb. evid. 141.

fore

fore a jury and swear that he has been guilty of it? In both cases the infamy of the witness is equally certain: in both cases there is equal reason to doubt his veracity: or rather there is this difference between them, that the latter is even a stronger case than the former; because it is possible that a man may be innocent, tho' a jury have thought him guilty; but where a man swears that he has committed a felony, it is impossible that he should not be guilty either of felony or perjury, and in neither case is he to be believed. I know, however, that by law such a witness is not incompetent, because in fact he has
not

not been convicted; but all I contend for is, that, according to the principles of law, he ought to be incompetent, because in all cases it is not the conviction, but the crime ascertained by the conviction, which incapacitates; and the crime is as fully ascertained by this public confession of the criminal, as it can be by a legal conviction.

A still stronger reason for rejecting the testimony of a man, against any one whom he calls his accomplice, is, that by law no man can be a witness to prove that which he has any interest to prove, however minute that interest may be: now an accomplice has

has the most powerful interest that a man can be actuated by, to give such testimony as will affect the life of the prisoner, because it is that on which his own life depends. Till after the trial is over he receives no pardon; but, in the words of lord Mansfield, has only
 “ a kind of hope, that if he be-
 “ have fairly, and disclose the
 “ whole truth, *and bring others to*
 “ *justice*, he shall himself escape
 “ punishment. . . . He is not
 “ assured of his pardon, he gives
 “ his evidence *in vinculis*, and it
 “ depends on the title he has
 “ from his behaviour, whether he
 “ shall be pardoned or execut-
 “ ed.”

“ed (71).” It would be grossly false, therefore, to say, that such a man has no interest but to speak the truth, because his obtaining a pardon depends upon his making an important discovery. If his evidence be not such as will affect the life of the prisoner, he has not made a discovery of any importance, he has done nothing towards bringing others to justice, he has not performed the condition upon which his pardon depended, and therefore has no title to demand it. His life does not depend, it is true, upon what Mr. Fielding calls “the *fate* of his evidence (72);”

(71) Cowp. rep. 336.

(72) Enquiry into the increase, &c. p. 178.

but

but it entirely depends upon the *nature* of it. It does not depend upon the conviction of the man against whom he swears, but it depends altogether upon his giving such evidence as would have warranted a conviction, if he had been believed (73).

These arguments are perhaps sufficiently forcible to exclude the evidence of accomplices in all cases, at any rate they surely show the inexpediency of extending the rule, and receiving such testimony when it stands alone and unsup-

(73) It is not long ago, upon the northern circuit, since an accomplice, who had been admitted to give evidence, in which he rather exculpated than criminated the prisoner, was himself tried, condemned, and executed.

ported.

ported. But it is said, that all which is contended for is, not that the prisoner should be convicted on this evidence, but only that it should have the effect of putting him on his defence, and compelling him to prove an *alibi*, or to produce witnesses to his character; and it is said that such evidence "may possibly do good, without the least probability of doing harm (74)." Is it no harm then to suffer a man's character to be blasted by the foulest aspersions? If the evidence be not to convict, why is it admitted, unless it be to satisfy an impertinent and an inhuman curiosity? But it

(74) *Thoughts, &c.* p. 165.

is only to convict if the prisoner cannot set up some good defence; as if this were not the only effect that the best evidence can have.

Alibis and character are mentioned, as defences which can never fail an honest man; as if it were a crime in every man not to keep a diary, and to be able to account for every hour of the last year or ten months of his life; and as if we had a right to hang every one, who is so poor as not to have influence enough over gentlemen of property and consideration, to prevail with them to give two or three days attendance till his trial may happen to come on. I say gentlemen of property and consideration,

tion, for with respect to character, the testimony of persons of any other description has little weight; and with reason, because a melancholy experience proves that it is not difficult to procure some unknown man to give a character to any one whom he has never seen.

But to return to the principal ground of this writer's complaints—the mal-administration of justice by an abuse of the power of suspending or remitting punishment. It is a subject indeed on which he seems to have no fixed or certain principles. From some passages in his work one might almost conclude, that he thought
the

the judges had not by law any power of reprieving convicts; and that, in every instance of their preventing the immediate execution of, a condemned prisoner, they violate their duty and subvert the constitution. If this were the fact (75), it would afford such an argument for a reform of our laws, as must be irresistible; for laws so sangui-

(75) The judge's "standing between the
 " judgment and execution *is taking upon him-*
 " *self* not only *to be wiser than the law*, but a
 " power, which, if wantonly and causelessly
 " exerted, must render the most important and
 " salutary laws contemptible and useless. The
 " judge, in such a case as this, sets himself
 " above the law, and presumes to exercise an
 " authority with which the constitution has not
 " entrusted even the crown itself." *Thoughts*,
 &c. p. 46, 1st edit. 48, 2d edit.

K

nary,

nary, that the very men appointed to guard and enforce, would find themselves compelled to counteract and defeat them; that the very sages of the law would be under the constant necessity of acting illegally, and the ministers of the public justice of betraying their public trust; could be considered in no other light, than as a disgrace to the nation and a reproach to humanity. If this were a true representation of the conduct of the judges, a reform of the laws would be necessary, if it were only as an indemnity to them. Either the laws ought to be reformed, or the judges impeached. But in truth (and

(and the writer of the *Thoughts* seems by other passages to acknowledge it) the judges have a strictly legal power to reprieve all convicts : and when it is considered, that by exerting that power they do nothing more than not prevent the crown from pardoning, it cannot be matter of surprise that reprieves are frequent (76).

The

(76) "Where the rigour of law," says Mr. justice Foster, "*bordereth upon injustice, mercy should if possible interpose in the administration. The judges are ministers appointed by the crown for the ends of public justice; and should have written on their hearts the solemn engagement his majesty is under to cause law and justice in MERCY to be executed in all his judgments.*" And in another place, "Whenever, in the case

The judges are subject to no other restraint in the exercise of this power, than that which is common to every man whom the constitution has entrusted with any discretionary power; the duty of exercising it prudently and conscientiously. Even the crown, in the exercise of its prerogative of

“ of individuals, the general rule shall be found
 “ to border on the *summum jus*, the benignity
 “ of our law hath provided a proper resource
 “ in the equity of the crown. I say the equity
 “ of the crown; for mercy to individuals,
 “ when properly conducted, is founded in natural equity, and in the principles of our
 “ constitution. It is nothing more than weighing the merits of each case, all circumstances
 “ considered, in the scale of wisdom and sound
 “ policy, against the rigour of the law.” Foster’s *Crown law*, p. 264, 184.

pardoning,

pardoning, lies under the same restraint. That these discretionary powers have in every particular instance been properly exercised, either by the crown or by the judges, it is not necessary, nor do I profess to maintain. If it has happened, that thieves of any description have been suffered to go quite unpunished, and have been turned loose upon mankind; and much more if murderers, or even robbers, guilty of acts of cruelty, have been shielded, by the interposition of the prerogative, from the punishment due by law to their crimes, undoubtedly a very gross breach of trust to the public has been disguised under the false

name of mercy to the prisoners ;
for,

Mercy but murders, pardoning those that
kill (77).

But instances of that kind have
of late years but very rarely, if
ever occurred. Far, however, be
it from me to pay the learned
judges so fulsome a compliment
as that " there are not twelve
" honefter or worthier men in the
" kingdom" than themselves (78)!
Much farther be it from me, be-
fore the smile of compliment has
passed from my cheek, to stab
those venerable magistrates to the
heart, with the insolent reproach,

(77) *Shakesp. Rom. and Jul.*

(78) *Thoughts, &c. p. 21.*

that

that "they are little better than
 "accessaries before the fact (79)," or with the scandalous insinuation, that "they save felons only because they are condemned (80)". Yet I will not hesitate to assert, that, whenever those judges have reprieved men convicted of felonies, in which no violence or outrage has been offered to any one, in order that all the circumstances of those poor wretches cases might be laid before the crown, far from deserving censure, they have done nothing, but what became them

(79) *Thoughts, &c.* p. 68, 1st edit. 72, 2d edit.

(80) *Ibid.* p. 51, 1st edit. 54, 2d edit.

as men, and what as magistrates
they were fully authorized to do
by the letter and the spirit of the
law, and the constitution.

A L E T T E R

FROM A

GENTLEMAN ABROAD

TO HIS

FRIEND IN ENGLAND.

THE JOURNAL OF THE

AMERICAN MEDICAL ASSOCIATION

PUBLISHED WEEKLY

VOLUME 11

NUMBER 1

JANUARY 1, 1918

CHICAGO, ILL.

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ADVERTISEMENT.

THE writer of the foregoing observations having been favoured with a copy of the following letter, by a friend of his, to whom it was addressed, thought he should render a very acceptable service to the public by printing it. At the same time, he cannot but feel it incumbent on him to make some apology for publishing it, in the form of an appendix to a work, which it very far surpasses in every kind of merit. The truth is, he was not at liberty to print it in any other manner. Although he cannot adopt all the sentiments

ADVERTISEMENT:

sentiments which it contains, yet he has not presumed to suppress any of them, but gives it to the public exactly as it came into his hands. The simplicity of style, and liberality of thought, which distinguish it, cannot fail of discovering its venerable author, to such as are already acquainted with his valuable writings. To those, who have not that good fortune, the editor is not permitted to say more, than, that it is the production of one of the best and most eminent men of the present age.

A L E T.

A L E T T E R
FROM A
GENTLEMAN ABROAD, &c.

March 14, 1785,

MY DEAR FRIEND,

AMONG the pamphlets you lately sent me, was one, intitled, *Thoughts on executive justice*: in return for that, I send you a French one, on the same subject, *Observations concernant l'exécution de l'article II. de la déclaration sur le vol.* They are both addressed to the judges, but written,

as you will see, in a very different spirit. The English author is for hanging *all* thieves. The Frenchman is for proportioning punishments to offences.

If we really believe, as we profess to believe, that the law of Moses was the law of God, the dictate of divine wisdom, infinitely superior to human; on what principles do we ordain death as the punishment of an offence, which, according to that law, was only to be punished by a restitution of fourfold? To put a man to death for an offence which does not deserve death, is it not a murder? And, as the French writer says *Doit-on punir un délit contre*
la

la société par un crime contre la nature (81)?

Superfluous property is the creature of society. Simple and mild laws were sufficient to guard the property that was merely necessary. The savage's bow, his hatchet, and his coat of skins, were sufficiently secured, without law, by the fear of personal resentment and retaliation. When, by virtue of the first laws, part of the society accumulated wealth and grew powerful, they enacted others more severe, and would protect their property, at the expence of humanity. This was abusing their power, and commencing a tyranny. If a savage, before he

(81) *Observations, &c.* p. 6.

entered

entered into society, had been told — “ your neighbour, by this
 “ means, may become owner of
 “ an hundred deer ; but if your
 “ brother, or your son, or your-
 “ self, having no deer of your
 “ own, and being hungry, should
 “ kill one, an infamous death
 “ must be the consequence,” he
 would probably have preferred
 his liberty, and his common right
 of killing any deer, to all the ad-
 vantages of society that might be
 proposed to him.

That it is better a hundred
 guilty persons should escape, than
 that one innocent person should
 suffer, is a maxim that has been
 long and generally approved ; ne-
 ver, that I know of, controverted.

Even

Even the sanguinary author of the *Thoughts* agrees to it, adding well,
 “ that the very thoughts of in-
 “ *jured* innocence, and much more
 “ that of *suffering* innocence, must
 “ awaken all our tenderest and
 “ most compassionate feelings,
 “ and at the same time raise our
 “ highest indignation against the
 “ instruments of it. But,” he adds,
 “ there is no danger of *either*
 “ from a strict adherence to the
 “ laws (82).” — Really ! — Is it
 then impossible to make an un-
 just law ? and if the law itself be
 unjust, may it not be the very
 “ instrument ” which ought “ to

(82) *Thoughts*, &c. p. 163, 1st edit. 168,
 2d edit.

“ raise the author’s and every bo-
 dy’s highest indignation?” I see
 in the last news-paper from Lon-
 don, that a woman is capital-
 ly convicted at the Old Bailey,
 for privately stealing out of a
 shop some gauze, value four-
 teen shillings and three pence, Is
 there any proportion between the
 injury done by a theft, value
 fourteen shillings and three pence,
 and the punishment of a hu-
 man creature, by death, on a gib-
 bet? Might not that woman, by
 her labour, have made the repa-
 ration ordained by God, in pay-
 ing fourfold? Is not all punish-
 ment inflicted beyond the merit
 of the offence, so much punish-
 ment

ment of innocence? In this light, how vast is the annual quantity, of not only *injured* but *suffering* innocence, in almost all the civilised states of Europe!

But it seems to have been thought, that this kind of innocence may be punished by way of *preventing* crimes. I have read, indeed, of a cruel Turk, in Barbary, who, whenever he bought a new christian slave, ordered him immediately to be hung up by the legs, and to receive a hundred blows of a cudgel, on the soles of his feet, that the severe sense of the punishment, and fear of incurring it thereafter, might prevent the faults that should merit it.

Our author himself would hardly approve entirely of this Turk's conduct in the government of slaves, and yet he appears to recommend something like it for the government of English subjects, when he applauds (83) the reply of judge Burnet to the convict horse-stealer, who being asked what he had to say why judgment of death should not pass against him, and answering, that it was hard to hang a man for *only* stealing a horse, was told by the judge, "man, thou art not to be hanged
 " *only* for stealing a horse, but
 " that horses may not be stolen."

(83) *Thoughts, &c.* p. 105, 1st edit. 112,
 2d edit.

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The man's answer, if candidly examined, will, I imagine, appear reasonable, as being founded on the eternal principle of justice and equity, that punishments should be proportioned to offences; and the judge's reply, brutal and unreasonable, though the writer "wishes all judges to carry it with them whenever they go the circuit, and to bear it in their minds, as containing a wise reason for all the penal statutes which they are called upon to put in execution. It at once illustrates," says he, "the true grounds and reasons of all capital punishments whatsoever, namely, that every man's pro-

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" perty,

" property, as well as his life, may
 " be held sacred and inviolate."
 Is there then no difference in value
 between property and life? If I think
 it right that the crime of murder should
 be punished with death, not only as an
 equal punishment of the crime, but to
 prevent other murders, does it follow
 that I must approve of inflicting the
 same punishment for a little invasion
 of my property, by theft? If I am not
 myself so barbarous, so bloody-minded,
 and revengeful, as to kill a fellow-crea-
 ture for stealing from me fourteen
 shillings and three pence, how can I
 approve of a law that does it? Montesquieu,
 who was him-
 self

self a judge, endeavours to impress other maxims. He must have known what humane judges feel on such occasions, and what the effect of those feelings ; and, so far from thinking that severe and excessive punishments prevent crimes, he asserts, as quoted by our French writer, p. 4, that

“ *L'atrocité des loix en empêche
l'exécution.*

“ *Lorsque la peine est sans mesure
on est souvent obligé de lui préférer
l'impunité.*

“ *La cause de tous les relâchemens
vient de l'impunité des crimes et non
de la modération des peines (84).”*

(84) This passage the author of the *Thoughts* cites, as corroborating the doctrines which he inculcates, p. 137, 2d edit.

It is said by those who know Europe generally, that there are more thefts committed and punished annually in England, than in all the other nations put together. If this be so, there must be a cause or causes for such depravity in our common people. May not one be, the deficiency of justice and morality in our national government, manifested in our oppressive conduct to subjects, and unjust wars on our neighbours? View the long-persisted-in, unjust, monopolizing treatment of Ireland, at length acknowledged! View the plundering government exercised by our merchants in the Indies; the confiscating war made upon the American colonies;

lonies; and, to say nothing of those upon France and Spain, view the late war upon Holland, which was seen by impartial Europe in no other light than that of a war of rapine and pillage, the hopes of an immense and easy prey being its only apparent, and probably its true and real motive and encouragement. Justice is as strictly due between neighbour nations as between neighbour citizens. A highwayman is as much a robber when he plunders in a gang as when single; and a nation that makes an unjust war is only a great gang. After employing your people in robbing the Dutch, is it strange, that, being put out of
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that employ by peace, they still continue robbing, and rob one another? *Piraterie*, as the French call it, or privateering, is the universal bent of the English nation, at home and abroad, wherever settled. No less than seven hundred privateers were, it is said, commissioned in the last war! These were fitted out by merchants, to prey upon other merchants, who had never done them any injury. Is there probably any one of those privateering merchants of London, who were so ready to rob the merchants of Amsterdam, that would not as readily plunder another London merchant of the next street, if he could do it with the same

same impunity? The avidity, the *alieni appetens* is the same; it is fear alone of the gallows that makes the difference. How then can a nation, which, among the honestest of its people, has so many thieves by inclination, and whose government encouraged and commissioned no less than seven hundred gangs of robbers; how can such a nation have the face to condemn the crime in individuals, and hang up twenty of them in a morning? It naturally puts one in mind of a Newgate anecdote. One of the prisoners complained, that in the night somebody had taken his buckles out of his shoes. "What the devil," says another, "have

“ have we then *thieves* among
 “ us? It must not be suffered.
 “ Let us search out the rogue,
 “ and pump him to death.”

There is, however, one late instance of an English merchant who will not profit by such ill-gotten gain. He was, it seems, part owner of a ship, which the other owners thought fit to employ as a letter of marque, and which took a number of French prizes. The booty being shared, he has now an agent here enquiring, by an advertisement in the Gazette, for those who suffered the loss, in order to make them, as far as in him lies, restitution. This conscientious man is a quaker.

ker. The Scotch presbyterians were formerly as tender ; for there is still extant an ordinance of the town council of Edinburgh, made soon after the reformation, forbidding “ the purchase of prize
 “ goods, under pain of losing
 “ the freedom of the burgh for
 “ ever, with other punishment at
 “ the will of the magistrate ; the
 “ practice of making prizes be-
 “ ing contrary to good consci-
 “ ence, and the rule of treating
 “ christian brethren as we would
 “ wish to be treated ; and such
 “ goods *are not to be sold by any*
 “ *godly men within this burgh.*”
 The race of these godly men in Scotland is probably extinct, or
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their principles abandoned, since, as far as that nation had a hand in promoting the war against the colonies, prizes and confiscations are believed to have been a considerable motive.

It has been for some time a generally - received opinion, that a military man is not to enquire whether a war be just or unjust; he is to execute his orders. All princes, who are disposed to become tyrants, must probably approve of this opinion, and be willing to establish it; but is it not a dangerous one? Since, on that principle, if the tyrant commands his army to attack and destroy, not only an unoffending neighbour nation,

tion, but even his own subjects, the army is bound to obey. A negro slave in our colonies, being commanded by his master to rob or murder a neighbour, or do any other immoral act, may refuse, and the magistrate will protect him in his refusal. The slavery then of a soldier is worse than that of a negro ! A conscientious officer, if not restrained by the apprehension of its being imputed to another cause, may indeed resign, rather than be employed in an unjust war ; but the private men are slaves for life ; and they are perhaps incapable of judging for themselves. We can only lament their fate, and still more that of a sailor,

sailor, who is often dragged by force from his honest occupation, and compelled to embroe his hands in perhaps innocent blood. But methinks it well behoves merchants (men more enlightened by their education, and perfectly free from any such force or obligation) to consider well of the justice of a war, before they voluntarily engage a gang of ruffians to attack their fellow-merchants of a neighbouring nation, to plunder them of their property, and perhaps ruin them and their families if they yield it, or to wound, maim, and murder them if they endeavour to defend it. Yet these things are done by christian merchants,

chants, whether a war be just or unjust, and it can hardly be just on both sides. They are done by English and American merchants, who, nevertheless, complain of private theft, and hang by dozens the thieves they have taught by their own example.

It is high time, for the sake of humanity, that a stop were put to this enormity. The united states of America, though better situated than any European nation, to make profit by privateering (most of the trade of Europe, with the West Indies, passing before their doors), are, as far as in them lies, endeavouring to abolish the practice, by offering, in all their treaties with other powers, an article

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engaging solemnly, that in case of future war, no privateer shall be commissioned on either side; and that unarmed merchant ships, on both sides, shall pursue their voyages unmolested. This will be a happy improvement of the law of nations. The humane and the just cannot but wish general success to the proposition.

With unchangeable esteem and affection,

I am,

my dear friend,

ever yours,